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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 458

BENJAMIN F. FIELDS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on October 27, 1947, which affirmed a verdict of guilty and a sentence in the District Court of the United States for the District of Columbia against the Petitioner under an indictment charging the Petitioner with violation of 52 Stat. 942 (1938) (21 U. S. C. A. Para. 192 (1940)).

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia is not yet reported but forms a part of this Petition (R. 404, 409). There was no opinion ren-

dered in the United States District Court for the District of Columbia when petitioner was found guilty of contempt, and sentenced to serve three months in a common jail, and to pay a fine of $250.00. This verdict and sentence was affirmed by the Appellate Court.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia was entered October 27, 1947 and this petition is filed within thirty (30) days. The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Sect. 347).

Questions Presented

1. Whether it is "Due Process of Law" where an indictment charged petitioner with a specific act, concerning a specific contract, a bill of particulars being denied, at time of trial a total failure of proof as to constituent elements, proof at variance from allegation was admitted and thereafter is convicted on an unrelated default.

2. Whether the words, "willfully makes default" as used in the statute, pertains to non-appearance, or allows a committee of Congress the right of search and seizure, *via duces tecum* in violation of the IV Amendment to the Constitution of the United States of America.

3. Whether it is error for the Court in a criminal case to allow the Government to cross-examine its own witness at the very beginning, before any hostility was shown, where no truth of any statement was sought, and where the sole result accomplished was to impeach his character and credibility, to show a previous criminal record of the Government witness and his association with the accused, and thus prejudice the petitioner.

4. Whether the Court erred in ruling that the resolution of Congress was controlling, in its determination of the legality of the action of the Committee, and excluded evidence as to what the Committee actually did.

5. Whether the Court erred in refusing the defendant's request relating to good faith and its bearing upon the issue of willfulness and bad faith.

6. Whether the Court erred in instructing the Jury that the word willful was used in the statute does not imply an evil or bad purpose.

Statute Involved

Title 2, U. S. C. A. Para. 192:

> "Section 192. Refusal of witness to testify.
>
> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months. As amended June 22, 1938, c. 594, 52 Stat. 942."

Statement

The purpose of Briefing the following evidence is to show there was no evidence before the Jury tending to fairly sustain the verdict.

On May 9, 1946, the House of Representatives created a Select Committee to make a full and complete study and investigation of the operation of the program for the sale,

leasing, or other disposition of surplus property, including plants, or other real estate, materials, munitions, vehicles, aircraft, vessels, camps, and cantonments, together with all other articles and facilities acquired by the Government of the United States, through its various departments, establishments, and agencies, in connection with the national defense and the war effort.

On August 12, 1947, petitioner voluntarily appeared before the Committee pursuant to a telephone call from Mr. Hugh D. Wise, the General Counsel of the Committee and brought with him certain files from his office upon the request of Mr. Wise. During the course of the examination of these, he willingly answered all questions and produced all records in his file and in compliance with a request from Mr. Rizley, a member of the Committee, voluntarily gave him the complete file. (R. 53) This was a complete file from the defendant's office and contained a complete history of the transaction with War Assets that has never been disputed with the exception of the opening statement to the Jury at the time of the trial when the District Attorney for the Government stated that the file delivered to the Committee contained only a small piece of paper which is Government's Exhibit No. 18. (R. 23, 24) This was proved to be an erroneous statement, and had the most vicious effect, that of inflaming the minds of the Jury against the petitioner.

Thereafter, petitioner was questioned extensively by the Committee and explained to them in detail how he paid his associates and other brokers that were connected with him, this investigation of the Committee being entirely into the private affairs of the Petitioner and for the purpose of discovering something unfavorable as indicated by the testimony of the Chairman of the Committee, Mr. Slaughter where he stated "Yes, we were definitely suspicious." (R. 222, 223)

On August 13, 1946, petitioner was served with a subpoena *duces tecum* at 4:15 PM that day, (R. 396) compliance this day being impossible as the Committee was not then in session, petitioner appeared before the Committee at its opening session on August 14, 1946.

On August 14, 1946, petitioner produced Exhibits No. 8 and 9 after a search of his office in unrelated files (R. 393, 394) was questioned as to what additional records he had. He stated that so far as he knew there were no additional records, until such time as they would be set up on his books by the Auditor, unless they were in the hands of the Auditor at that time. (R. 180, 182, 184)

On August 15, 1946, petitioner again appeared before the Committee after being excused the previous day. Petitioner was questioned again about additional records reflecting the payments or the use he made of the commission he received in the War Assets transaction and after he had explained to the best of his knowledge, which explanation was never proved to be false, Mr. Slaughter, the Chairman, stated, ". . . and you decline to bring anything further other than the memorandum which was produced Monday?" to which Mr. Fields replied "I do not decline to bring anything at all that you request providing it is in my possession" (R. 189) thereafter, the petitioner was excused, and the chairman of the Committee referred a contempt citation against the petitioner to the District Attorney.

On September 30, 1946 a Grand Jury in the District Court of the United States for the District of Columbia holding criminal term returned an indictment against the petitioner (R. 2, 3, 4) which charged in two counts that the defendant willfully failed and refused to produce before the Committee all papers, books, records, documents, memoranda, notes, ledger sheets, cancelled checks, and other evidence of payment and other material relating to a contract between the United States and Warr Built Homes, Inc., or

C. B. Warr, or Warr Caston Lumber Company dated about June 19, 1946, which were available to him and which he could have produced and thereby on August 14, 1946 within the District of Columbia, willfully did make default, a second count, related petitioner was also in contempt on the 15th of August, under the conditions as alleged in the first count.

On October 21, 1946, the District Court of the United States for the District of Columbia denied a motion to quash the indictment; said motion was accompanied by an affidavit of petitioner. (R. 5, 6, 7, 8, 9, 18, 19)

On October 21, 1946, defendant entered a plea to the indictment of "Not Guilty."

On October 23, 1946, the District Court of the United States for the District of Columbia denied petitioner a motion to have the Government furnish a copy of the contract alleged in the indictment, it being an alleged contract between the United States and a third party. (R. 9, 10, 19)

On November 8, 1946, the Court denied petitioner a bill of particulars which defendant sought in order to prepare his defense. (R. 11, 12, 20)

On January 22, 1947, the Government proceeded to trial. In the opening statement to the Jury, the District Attorney stated that the petitioner willfully refused to turn over documents to the Committee, and since they were pertinent documents he should have produced, he was therefore in contempt of that Committee. (R. 20) That there was in effect a contract, and that petitioner should have had in his possession certain papers having to do with the sale by the Government, an order from Baumrin Bro. a disposal document, shipping instructions, and a request for the shipping instructions; that there were enough copies of these various papers sent to petitioner so that in each case or several copies could have been kept by him and presumably were kept, and that the only record he did produce was

written an a small piece of paper which is Government Exhibit No. 18 (R. 20, 21, 22, 23, 24. 25, 26).

The Court then stated that it was going to rule that good faith is no defense under the statute involved, despite the fact that two judges in this District have ruled that good faith is a defense; counsel for petitioner stated that in the *Sinclair* case and the *Townsend* case, the question of good faith was not a defense; in these cases there was a deliberate refusal to testify, and the defendants stood to rise or fall on the question of whether their refusals were justified or not.

At the beginning of the trial the District Attorney stated he had issued a subpoena *duces tecum* to an employee of Rockingham Marketers, an organization with which the petitioner testified he had had certain transactions. (This subpoena *duces tecum* was never produced by the Government and in fact could not be located either at the time of trial or presently; its contents are therefore unknown to petitioner.) (R. 28)

After the District Attorney examined the books and records produced from Rockingham Marketers, the Government changed its theory as to the guilt of the defendant. When interrogated by the Court as to why the Court had not been apprised of what papers the Government claimed should have been produced the District Attorney answered: "At that time I did not know what data had not been produced." (R. 118) This statement was made not withstanding the opening statement to the Jury. (R. 23, 24)

The District Attorney then contended that documents which petitioner willfully failed to produce were, a notation on a void check stub, a bank statement, and a duplicate deposit slip. (R. 127, 128, 129) Exhibits 11, 14, 15. (R. 395, 400, 401)

The Court ruled these papers were within the scope of the subpoena duces tecum served upon petitioner on Au-

gust 13, 1946, and should have been produced (R. 213, 214, 215, 216). No witness for the Government ever stated they were the records sought, even though the chairman of the Committee was called as a witness, therefore the Corpus Delecti was never identified.

It must be conceded they do not reflect the payment of any commission. And it is conceded they are not related to or connected with a contract of any description.

George W. Hines, Assistant Cashier of the Industrial Bank of Washington, testified that in the normal course of business a depositor receives a bank statement at the end of each month (R. 95) but that he had no personal knowledge that a bank statement for the month of June 1946 was mailed to Rockingham Marketers (R. 97). He appeared before the Select Committee (R. 101) and stated that he had seen the deposit slip of Rockingham Marketers, dated June 20, 1946 (defendant's exhibit 11) (R. 94, 95) and that the original of such exhibit were before the Select Committee on August 15, 1946 (R. 102) and the Government stipulated that the deposit slip of June 20, 1946 and ledger sheets for June 1946 of Rockingham Marketers were before the Select Committee (R. 103).

Mary Brown, a Government witness, testified that she produced all records of Rockingham Marketers and that all book-work for such company was performed by an auditor (R. 106); that petitioner had no authority to sign checks for such company (R. 107) and that she always made out the check stubs of such company (R. 107); that she made out deposit slips in duplicate (R. 108). That she did not receive bank statements at the beginning of each month; that the bank was slow in sending the same and on occasion she had to go to the bank to secure such statements; that such statements were a month or two late (R. 108); that the June 1946 bank statement could have been received in August 1946 (R. 114); that sometimes they were two (2)

months apart (R. 120). She produced bank statement of Rockingham Marketers for June 1946 (Government Exhibit 14, R. 121); that defense counsel had duplicate deposit slips for June 20, 1946 of Rockingham Marketers, and she identified check stub of Rockingham Marketer's bank book, dated June 29, 1946, payable to Glenn Dies, in the amount of $1206.89 (R. 125); that it was marked "Void" because it was paid in cash by defendant (R. 125). That Government's Exhibit 15 had no notation on it associating such stub with 539 rolls of bronze screen wire mesh (R. 136); that the deposit slip (defendant's Exhibit 11) was produced from file on Sharp Construction Co. (R. 136).

Glenn A. Dies, a Government witness, testified that he worked with the defendant and John Brunner on a one-third (⅓) basis (R. 139, 140); that the two partners of Rockingham Marketers were Mrs. Fields and Ward Duffield (R. 140); that the Baumrin deal fell through because Baumrin did not want the wire (R. 141); that Dies settled with petitioner on June 29, 1946 and he made out a memorandum which he showed to petitioner (R. 148) that petitioner made some figures from it (R. 151) and such memorandum was never in Fields' custody (R. 156, 157).

Roger C. Slaughter, a Government witness and Chairman of the Select Committee, testified that the Committee took the "John Doe" memorandum and conformed the subpoena duces tecum to find out how the money was split and who the two "John Does" were (R. 221); that the Committee was not willing to take defendant's version as to Brunner (R. 221) and that he was suspicious although he had no knowledge of the existence of any records not produced (R. 221); that defendant told the Committee that one of the "John Does" was actually John Brunner and that the other was Howard Payne (R. 223, 224) and that Strom, defendant's auditor informed the Committee that a ledger was not kept by defendant (R. 225) and that Strom

had done very little work on defendant's books for 1946 (R. 226); that when examining defendant before the Committee, after the issuance of the subpoena, he knew all exhibits as to the bronze wire deal were then before the Committee (R. 229).

John Brunner was called as a Government witness, and immediately the court allowed the District Attorney to cross-examine Brunner in regard to a criminal record (R. 240, 241, 242, 243) for no obvious reasons. The only natural result was to poison the minds of the Jury against the petitioner, he testified that he was engaged with petitioner and Dies on a one-third (⅓) participating basis (R. 250).

Up to this point the Court had (a) refused to quash the indictment, (b) denied petitioner a bill of particulars, (c) the District Attorney had changed his theory of guilt from his opening statement, (d) the Court had ruled that the legality of the actions of the Committee was bounded by the resolution and not what the Committee actually did, (e) the District Attorney by his own witness had proved that no such a contract was alleged in the indictment ever existed; (f) no testimony whatsoever had been offered that the three documents namely a duplicate deposit slip, a bank statement, and a check stub marked "Void" were the documents sought by the subpoena duces tecum of August 13, 1946; (g) the Court had allowed the District Attorney to impeach his own witness at the expense of the petitioner; (h) no testimony had been offered to show that petitioner had willfully defaulted in producing these documents or substantial testimony that they were in his possession or that he knew of their existence; (i) it was proved that the file voluntarily produced by petitioner on August 12, 1946, and the additional documents produced in compliance with the subpoena duces tecum of August 13, 1946 were the complete records of the transaction under inquiry;

(j) it was proved that no records were in existence which reflected the payment of commissions other than what was produced before the Select Committee; (k) the Court ruled the second count of the indictment did not refer to any contract (R. 278) (R. 4) in plain disregard of the English language. This was the end of the Government's case.

Motion for Directed Verdict

Upon the prosecution resting, the defendant moved for judgment of acquittal on various grounds, included among which was failure to make out a *prima facie* case against defendant, no proof of "willful" failure of defendant to produce, and a fatal variance between the indictment and the proof submitted. Such motion was denied (R. 278).

Defendant's Evidence

Robert F. Haggerty, director of Sales Group One of War Assets Administration, had access to the documents of such office relative to sales by such administration (R. 279, 280); that there were no contracts between the United States and C. B. Warr, Warr Built Homes, Inc., or Warr-Caston Lumber Company (R. 280).

Ted R. Strom testified that he was defendant's accountant and that he was served with a subpoena by the Select Committee on August, 1946 (R. 282); that Fields told him the Committee wanted his ledger sheet reflecting the wire screen transaction (R. 283); that he told defendant there was no such ledger sheet in existence and it would take him two or three months to prepare it (R. 285); that Government Exhibit 14 did not reflect the payment of anything (R. 286); that no entries of Government's Exhibits 14 and 15, or defendant's Exhibit 11, had been made in the books of Rockingham Marketers in August or September 1946 (R. 291, 292); that he went to the Industrial Bank on several occasions in 1946 to pick up the bank statements (R. 295);

that on one occasion it was two (2) or two and one-half (2½) months after the statement was due (R. 295); that he found defendant's Exhibit 14 on his desk between August 1st and 5th, 1946 and two days later defendant told him that "John Does" were Brunner and Payne, and such information was for the purpose of reporting defendant's income tax return to the Government (R. 298); that he had done nothing on the wire screen deal up to the time of the trial (R. 302, 303).

The defendant received a summons in July, 1946, which had been left at his office (R. 314); he went to the office of Mr. Wise, general counsel for the Special Committee, and had a conference with him (R. 315). Mr. Wise requested and defendant agreed to produce records pertaining to the bronze wire screen deal, and another summons was served on defendant (R. 316); that he attended a hearing on August 12, 1946 before the Committee and brought with him, from his office, a file or folder with the designation thereon "bronze screening"; that this file had what defendant considered were all the papers in connection with the origination and completion of the bronze screen wire deal (R. 317). The Government stipulated that it contained defendant's Exhibits 2, 3, 4, 5, 6 and 7 (R. 81, 82, 83). This file was delivered to the Committee (R. 319). On August 14, 1946 he delivered to the Committee defendant's Exhibits 8 and 9, as well as other documents (R. 319). He was asked to produce other records reflecting payment of commissions on bronze screen wire deals and conversed with his auditor as to the production of such records. Strom told him he couldn't have such records for a month or two (R. 321). He so advised the Committee (R. 321). Defendant told the Committee how the bronze screen wire was purchased and to whom and by what means the same was sold to Warr-Caston Lumber Company. He identified the participants in such transaction as Dies, Payne (R. 329) and John Brun-

ner (R. 329); that defendant, Dies and Brunner agreed on a basis of splitting the profit on a one-third (⅓) basis (R. 326); that he prepared the memorandum of a deal and Strom, his accountant, made all entries (R. 329).

That on August 14, 1946, he appeared before the Committee pursuant to a *subpoena duces tecum* (R. 327); that he discussed such *subpoena* with his auditor and office attaches and could find no other records (R. 327); that the memorandum which he made on a scratch pad at the time of Dies' settlement was thrown away (R. 359); that he destroyed the check to Dies on the first Tuesday or Wednesday of July, 1946. On August 14, 1946, he gave the Committee the Baumrin file; that Brunner's account was credited to him. That there never was a contract between United States and Warr Built Homes, Inc., C. B. Warr or Warr-Caston Lumber Company (R. 325, 326, 327, 328, 329).

Motion for Judgment of Acquittal Renewed

The Government offered no rebuttal. Defendant renewed his motion for a judgment of acquittal. The Court granted the judgment of acquittal as to the first count but denied said motion as to the second count. (A printer's error deleted this portion of the transcript from the record. However it appears on transcript pages 1456, 57, 67.)

The prayers requested by the petitioner appear in record (R. 12, 13, 14, 15, 16) with some parts granted in substance, and that part relating to good faith, or the lack of bad purpose deleted. The Judge's charge to the Jury appears in record (R. 362 to 378). The Jury returned a verdict of Guilty.

Appeal was taken to the United States Court of Appeals for the District of Columbia, the opinion of that Court affirmed, the trial and verdict of the United States District Court for the District of Columbia (R. 404, 408).

Specification of Errors to Be Urged

The United States Court of Appeals erred:

1. In holding that legality of a congressional committee is bounded by the resolution under which they are appointed and not what they actually do.

2. In holding that the petitioner was not entitled to a bill of particulars when the specific act alleged in the indictment could not be identified.

3. In holding that a committee of congress can conduct a fishing expedition into the private affairs of an individual based on suspicion via a *subpoena duces tecum,* notwithstanding the Fourth (IV) Amendment to the Constitution.

4. In holding that the second count of the indictment did not refer to a contract as alleged in the first count.

5. In holding that the District Attorney could change his theory as to the guilt of petitioner after his opening statement to the Jury.

6. In holding that the *Corpus delicti* need not be identified as that which was sought by the *subpoena duces tecum,* that being the crux of the default and the alleged contempt.

7. In holding that petitioner could not introduce evidence to show, the default as defined by the Court and District Attorney, was not what the Committee alleged was the default or what the Committee requested (R. 283-290).

8. In holding that petitioner should be denied a directed verdict when there was total failure of proof, and a variance of proof as alleged in the indictment.

9. In holding that the District Attorney could impeach the credibility of a Government witness, and show his association with the accused for no obvious reason but to prejudice the petitioner, in the presence of the Jury.

10. In holding that the word willfully does not mean done with an evil or bad purpose when used in a criminal statute.

11. In holding that petitioner should be denied his prayer relating to good faith and its bearing upon lack of bad faith and the absence of an evil purpose.

12. In affirming the verdict and sentence of the United States District Court for the District of Columbia.

Reason for Granting the Writ

The Court below, in a trial and decision without precedent, and in direct violation of the rulings of this Court plus the protection afforded petitioner under the Bill of Rights in the Constitution of the United States of America has; brought the petitioner to trial on an indictment that should have been dismissed, denied him a bill of pariculars, failed to prove the allegations in the indictment, did not identify the *corpus delicti*, poisoned the minds of the Jury against petitioner, and then refused to give the proper instructions to the Jury at the close of the case, which deprived petitioner of his only remaining defense; good faith or the absence of bad purpose and intent, there being nothing left for the decision of the Jury, and thus, taken in its entirety, petitioner's trial amounted to a directed verdict against him in a criminal charge. Due process of Law was disregarded.

Petitioner did not receive even the semblance of a fair and impartial trial and in this respect the lower Court has violated an established rule of law as known by this Court.

In the Court's determination of the Committee's legality, it was bound to receive evidence as to what the Committee actually did, otherwise there would be no boundary.

In the case of *Sinclair* v. *U. S.*, 279 U. S. 263, this Court stated:

> "It has always been recognized in this country and it is well to remember that few, if any, of the rights

> of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

The lower Court was definitely in error when it used the boundary lines of the resolution under which the Committee acted as the criterion of the legality of the Committee's actions rather than what the Committee actually did.

In *Kilbourn* v. *Thompson,* 103 U. S. 168, this Court said:

> "No person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen."

In *McGrain* v. *Daugherty,* 273 U. S. 135, this Court stated:

> "Neither house is invested with general power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied."

Even though petitioner willingly acquiesced in the previous unlawful demands of the Committee he was nevertheless cited for contempt, when their "fishing expedition" did not bring forth material to corroborate and justify their suspicions.

Upon the return of the indictment, which contained allegations concerning a contract that could not be identified, petitioner's only recourse was to a bill of particulars as stated in *Nusbaum* v. *State of Maryland,* 156 Md. 149, *U. S.* v. *Creech,* 21 Fed Supp. 439, *U. S.* v. *American Med. Assn.,* 72 App. D. C. 12, *U. S.* v. *U S. Gypsum Co.,* 37 Fed. Sup. 398. (While a demand for the particulars of the

offense is addressed to the Court, it is a sound discretion, and may be reviewed where there is a gross abuse of it, resulting in injury to the accused.) This only avenue of recourse was denied to petitioner.

The IV Amendment provides—

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

If a committee of Congress can go on a fishing exposition into the papers and effects of an individual, with an indefinite *duces tecum*, "purely on suspicion," this amendment is defeated and the rights of the people are insecure. This act alone if condoned would set a precedent unknown in our system of Justice.

At the time of trial, the variance between the indictment and the proof was fatal to the indictment and could not be justified. When the Court ruled: "Motion denied. I might say that I again remind counsel of the fact that the second count of the indictment does not refer to any Warr contract. The reference to the Warr contract is only in the first count of the indictment. And, of course, both counts of the indictment will be submitted to the Jury if the case goes that far" (R. 278). There is no possibility of reconciling this ruling of the court with the expressed statements in the indictment. FIRST COUNT: "Before the Committee in its Session of August 12, 1946, Benjamin F. Fields, testifying as a witness, was questioned regarding a contract between the United States and Warr Built Homes, Inc., or C. B. Warr, or Warr-Caston Lumber Company, dated about June 19, 1946, for the sale of five hundred and thirty-nine rolls

of bronze mesh screen wire, . . . (This contract will be referred to hereafter in this indictment simply as the contract.) . . . SECOND COUNT: The Grand Jury further charges: THAT UNDER THE CIRCUMSTANCES SET FORTH IN THE FIRST COUNT OF THIS INDICTMENT, THE ALLEGATIONS OF WHICH ARE INCORPORATED IN THIS COUNT, . . ., AND OTHER EVIDENCE OF PAYMENTS AND OTHER MATERIAL RELATING TO THE CONTRACT DESCRIBED IN THE FIRST COUNT OF THIS INDICTMENT WHICH WERE AVAILABLE TO HIM AND WHICH HE COULD HAVE PRODUCED, AND THEREBY ON AUGUST 15, 1946, WITHIN THE DISTRICT OF COLUMBIA, WILLFULLY DID MAKE DEFAULT" (R. 3-4).

In the case of *Berger* v. *United States,* 295 U. S. P. 82, this Court stated:

> "The general rule that allegations and proof must correspond is based upon the *the* obvious requirements (1) that the accused must be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. Bennett *v.* U. S., 227 U. S. 333, 338. Harrison *v.* U. S., 200 Fed. 662, 673. U. S. *v.* Mills, 36 F. (2nd) 855, 856-857. *Cf.* Hagner *v.* U. S., 285 U. S. 427, 431-433."

There can be no dispute that the Court was under the erroneous impression that good faith had no bearing upon the issue of willfulness. This is evidenced by the Court's remarks set forth above, as well as the express statement of the Court at the conclusion of the District Attorney's opening to the jury (R. 27):

> "Mr. Hitz: The Government made a rather full statement in its opening, with regard to what it will offer in proof, for the reason that two other Judges in the District have ruled that good faith is a defense under this statute.

"The Court: I am going to rule that it is not because I looked up the authorities; and with all due deference to my brethren, I have not been able to concur with them.

"Mr. Hitz: I am delighted to hear that, Your Honor. That was one reason why I made a rather full opening of this case."

In accordance with its views on the subject, the Court, on at least one occasion before the jury and again in its charge stated that the fact that the defendant produced certain documents before the Slaughter Committee is no defense to the indictment.

During the trial the Court, referring to a document produced before the Committee, said:

"The Court: My understanding was that the Government produced it for a definite purpose.

"I suggest again, in the interests of expedition, that counsel agree upon a list of documents that were produced by the defendant before the Slaughter Committee. We are not trying this defendant for producing documents; he is being tried on a charge of failing to produce certain documents. Now, the fact that he produced certain other documents is no defense to the indictment * * *" (R. 102)

The Court later, in its charge to the jury:

"The fact that a defendant had produced certain other documents does not excuse him from producing the particular documents that are in question and that are covered by the subpoena. The fact that possibly the same information might have been procured by the Committee from some other source, if this is the case, does not excuse the defendant from producing the documents, because the Committee has a right to determine from what source it will get its information and what documents it desires to have produced before it." (R. 370)

While these statements, if removed from the context and considered objectively, are not entirely incorrect (for surely, the production of one document would not be an *absolute* defense to a charge of failing to produce another) nevertheless, when considered in the light of the particular facts and circumstances of the case before the Court, they represent an inaccurate statement of the law for the reason that they deny the importance of good faith in determining the issue of whether or not the failure to produce any given document was "willful" within the meaning of the word.

It is the theory of the petitioner that proof of the fact that the defendant, not only in response to the subpoena *duces tecum* but also *voluntarily*, produced several records and memoranda before the Committee, is at least some evidence of the fact that he acted in good faith and did not "willfully" default.

Thus, the refusal of the Court to charge as requested constituted error.

United States v. *Murdock*, 290 U. S. 389; 54 S. Ct. 223. In this case the defendant, while being examined by a revenue agent, had refused to answer certain questions on the ground that the answer might incriminate him. At the trial, the defendant offered no evidence on his own behalf but at the conclusion of the case made the following request to charge, which was refused:

> "If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful."

In affirming the judgment of reversal and holding that the trial court erred in refusing the request, the Supreme Court said at page 226 of 54 S. Ct.:

> "Here we are concerned with a statute which denounces a willful failure to do various things thought

> to be requisite to a proper administration of the income tax law, and the government in the trial below, we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent, in good faith to exercise a privilege granted the witness by the Constitution. The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

In the instant case, the jury might well have found under a proper instruction that, although the defendant had failed to produce the three instruments eventually relied upon by the Government, his default in so doing was not prompted by an evil motive or bad faith, and therefore have acquitted him. Under the charge as given, the jury was bound to convict upon a mere finding that there were some records or instruments not produced, regardless of the reason, lack of bad purpose, or good faith of the defendant in so defaulting.

The Court's charge on the issue of "willfulness" and its explanation of the meaning of this term is found at (R. 368) and was as follows:

> "Now, what is meant by the term 'wilful'? By the term 'wilful' it is meant that the failure and refusal to produce was not inadvertent, was not accidental, but was deliberate and intentional.
>
> "The word 'wilful' may also mean conduct marked by careful disregard of or plain indifference to the requirements of the statute. The word 'wilful' does not mean that the failure or refusal to comply with the order of the Committee must necessarily be for an evil or bad purpose. The reason or the purpose of failure to comply or refusal was deliberate and intentional and was not a mere inadvertence or an accident."

Clearly, the Court was under the impression and accordingly charged the jury, that the word "willful" meant that which was done or omitted consciously or deliberately as opposed to accidentally or inadvertently; and further, that as used in the statute under consideration, i. e.: Section 192 of Title 2, U. S. C. A., the term did not demand the existence of a bad or evil purpose.

An exception was taken to this portion of the Court's charge, and in addition, prayer No. 5 of the defendant, which related to this subject, was denied by the Court.

It is quite apparent that the Court adopted the meaning of the word "willful" as defined in civil actions, and refused to grant to the defendant the benefit of the construction of the word as universally adopted in criminal actions, which demands the presence or existence of an evil or bad motive.

The position thus adopted by the Court on this issue in effect makes the mere failure to produce any document a crime regardless of a person's good faith or lack of evil nature or intention, and constitutes reversible error.

Screws v. *U. S.*, 325 U. S. 91; 65 S. Ct. 1031;
Spies v. *U. S.*, 317 U. S. 492; 63 S. Ct. 364;
U. S. v. *Murdock*, 290 U. S. 389; 54 S. Ct. 223;
Spurr v. *U. S.*, 174 U. S. 728; 19 S. Ct. 812;
Felton v. *U. S.*, 96 U. S. 699; 24 L. Ed. 875.

In the recent case of *Screws* v. *United States, supra*, the Supreme Court had occasion to review its decisions interpreting the meaning of the word "willful" as used in various instances, and in holding that when used in criminal statutes it generally means an act done with a bad purpose, the Court said at page 1035 of 65 S. Ct.:

> "We reecntly pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' Spies *v.* United States, 317 U. S. 492,

497, 63 S. Ct. 364, 367, 87 L. Ed. 418. At times, as the Court held in United States *v.* Murdock, 290 U. S. 389, 394, 54 S. Ct. 223, 225, 78 L. Ed. 381, the word denotes an act which is intentional rather than accidental. And see United States *v.* Illinois Centr. R. Co., 303 U. S. 239, 58 S. Ct. 533, 82 L. Ed. 773. But 'when used in a criminal statute, it generally means an act done with a bad purpose.' United States *v.* Murdock, 290 U. S. at page 394, 54 S. Ct. at page 225, 78 L. Ed. 381. And see *Felton* v. *United States*, 96 U. S. 699, 24 L. Ed. 875; Potter *v.* United States, 155 U. S. 438, 15 S. Ct. 144, 39 L. Ed. 214; Spurr *v.* United States, 174 U. S. 728, 19 S. Ct. 812, 43 L. Ed. 1150; Hargrove *v.* United States, 5 Cir., 67 F. 820, 90 A. L. R. 1276. In that event something more is required than the doing of the act proscribed by the statute. Cf. United States *v.* Balint, 258 U. S. 250, 42 S. Ct. 301, 66 L. Ed. 604. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr *v.* United States, supra, 174 U. S. at page 734, 19 S. Ct. at page 815, 43 L. Ed. 1150; United States *v.* Murdock, supra, 290 U. S. at page 395, 54 S. Ct. at page 225, 78 L. Ed. 381. And that issue must be submitted to the jury under appropriate instructions. United States *v.* Ragen, 314 U. S. 513, 524, 62 S. Ct. 374, 379, 86 L. Ed. 383."

It will also be noted that the Court stated that the issue must be submitted to the jury under appropriate instructions.

In *United States* v. *Murdock, supra,* the Supreme Court interpreted the meaning of the word "willful" as used in Section 114(a) of the Revenue Act of 1926, which provides that anyone is guilty of a crime who "wilfully" fails to pay any tax provided for in that title, "make such returns, keep such records or supply such information at the time or times as required by law." The defendant requested a charge relating to good faith as bearing on the question of willfulness, which was refused, and in affirming the judg-

ment of reversal by the Circuit Court, the Court said at page 226 of 54 S. Ct.:

> "Aid in arriving at the meaning of the word 'willfully' may be afforded by the context in which it is used (United States *v.* Sioux City Stock Yards (C. C.), 162 (F. 2d 556, 562), and we think in the present instance the other omissions which the statute denounces in the same sentence only if willful aid in ascertaining the meaning as respects the offense here charged. The revenue acts command the citizen, where required by law or regulations, to pay the tax, to make a return, to keep records, and to supply information for computation, assessment, or collection of the tax. He whose conduct is defined as criminal is one who 'wilfully' fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information.
>
> "It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief."

So, too, in the instant case. It is obvious that Congress did not intend to brand everyone a criminal who failed to produce any document or paper requested by any of its various committees, regardless of the person's good faith or lack of bad purpose in so defaulting. This becomes more apparent when we consider the great breadth of most subpoenas. If it were otherwise, a person subpoenaed would risk being found guilty of a crime unless he produced every imaginable book, paper or memorandum, no matter how

unrelated to the issue, for the crime would be committed upon his failure to produce the instrument regardless of the fact that he, in all sincerity, did not believe that its production was commanded by the subpoena *duces tecum*.

The Court's erroneous conception of the meaning of the word "willful" was obviously based upon a misinterpretation of the three cases cited as authority by the Court in its ruling on the motion for a judgment of acquittal at the conclusion of the Government's case. At that point the Court cited *Sinclair* v. *United States*, 279 U. S. 263; *Townsend* v. *United States*, 68 Appeals D. C. 223, 95 F. 2d 352, and *United States* v. *Illinois Central Railroad Co.*, 303 U. S. 239. None of these cases support the Court's conclusion.

The *Sinclair* and *Townsend* cases both involved a violation of the second portion of Section 192.

United States v. *Murdock*, 290 U. S. 389, 54. S. Ct. 223.

In fact, the *Townsend* case left this very issue undecided, saying that in any event the defendant's rights were not prejudiced for the reason that the court had given the broad charge on the issue of willfulness which embraced the element of bad purpose. (95 F. 2d 352, 358.)

The Lower Court eliminated this from its consideration.

The *Illinois Central* case is likewise not in point, for it involved the interpretation of "willful" as used in a statute which makes railroads liable for a penalty under certain circumstances and provides that the penalty may be recovered by the United States in a civil action.

The Court's charge to the jury amounted to a direction to return a verdict of guilty.

It will be remembered that on the issue of "willfulness" the Court erroneously adopted the narrow construction of the word which excludes the element of bad faith, and the Court in its charge so directed the jury. We are therefore

confronted with a situation where, even if otherwise faultless, the Court's charge was prejudicial to the defendant.

But even that situation did not prevail in the case at bar for, as it will hereinafter clearly appear, the Court's charge, in substance, decided all issues of fact and left to the jury no alternative but to return a verdict of guilty.

In its charge to the jury, after touching upon such preliminary matters as the presumption of innocence, burden of proof, etc., the Court informed the jury that the Government was basing its case upon the non-production of three documents, a bank statement of the Rockingham Marketers' account, a duplicate deposit slip made by the Rockingham Marketers in the Industrial Bank on June 20, 1946 and a stub in the check book of the Rockingham Marketers which showed the issuance of a mail check to Glenn A. Dies, dated June 29, 1946 for the sum of $1,206.89 (R. 368).

The Court also charged the jury that these three documents were covered by the subpoena *duces tecum* in question and that it was not disputed that these documents were not produced by the defendant before the Committee (R. 369).

The jury was then informed that in order to arrive at their verdict, it would be necessary for them to decide three issues (R. 369):

> "First, whether any one of these documents was in the possession or control of the defendant at the time that this subpoena was served on him.
>
> "Second, whether the defendant knew, or should have known, that any one or more of these documents were in his possession or control at that time. A person may not shut his eyes to what is in his files. He must make reasonable efforts to find whatever pertinent and relevant papers are in his possessions or in his control, and which are called for by a subpoena.
>
> "And, third whether the defendant's failure to produce any of these documents before the Committee

was wilful—bearing in mind the definition of the word 'wilful' that I gave you a few moments ago."

As can be seen, the first question relates to possession or control; the second to knowledge, either actual or constructive, of such possession; and the third, to the "wilfulness" of the failure to produce them, disregarding the elements of good faith or bad purpose.

After submitting the issue of the possession of the first instrument, the bank statement, to the jury as a question of fact, the Court spoke of the possession or control of the other two instruments in the following words:

"When we come to the other two documents, the duplicate bank deposit slip and the check stub in his check book, it is admitted—certainly it is not denied—that at the time the defendant was served with the subpoena, and at the time he appeared before the Committee, these documents were in the files of the Rockingham Marketers, a concern in which the defendant was a partner and whose business was being directed and controlled by him.

"The evidence tends to show that these documents were in the defendant's offices and under his control; or possibly they might have been temporarily in the possession of the defendant's auditor. But if the documents were in the possession of the defendant's auditor, it was the defendant's duty to obtain them from the auditor, for the purpose of producing them before the Committee, because the auditor was an employee or an agent of the defendant for the purpose of keeping his accounts."

Thus it can be seen that the Court disposed of the first two issues supposedly to be decided by the jury by charging them that two of the three documents were in the files of the Rockingham Marketers or temporarily in the possession of the defendant's auditor and that "a person must not shut his eyes to what is in his files" and that if they

were in the possession of the auditor, the defendant was bound to obtain them.

Under a proper charge, the defendant would have little or nothing of which to complain up to this point for he did not deny that at least the third instrument, the check stub, was in his possession and control and from this fact, it would be reasonable to impute to him at least constructive knowledge of such possession and control.

There remained only the third issue to be decided—that of "willfulness." The Court's charge on this subject has been considered at length above and, as was pointed out, the Court expressly ruled out the element of bad purpose and the defense of good faith.

Thus the defendant was deprived of his only defense to the indictment, good faith or the absence of bad purpose and intent, and there was nothing left for the decision of the jury.

Therefore, since the Court expressly decided the issues under the first two questions submitted to the jury, and erroneously deprived the defendant of his only defense under the third and only remaining question, the Court's charge amounted to a direction to the jury to return a verdict of "guilty," and constituted reversible error.

The Trial Court erred in permitting the Government to treat its witness, John Brunner, as hostile, and in allowing the District Attorney to impeach his credibility.

Before calling the witness Brunner to the stand, the District Attorney requested a conference at the bench, which request was granted. The conversation had between the Court and counsel at that time begins at (R. 238) and concludes at (R. 243) and is too lengthy to permit its being set forth in full herein. However, the substance was as follows: the District Attorney requested that the witness about to be called by the Government, namely, John Brunner, be deemed "hostile" and that he be permitted to cross-examine him at the outset. This request was stated to be

based upon the fact that Brunner was associated in business with the defendant as well as the fact that the District Attorney had concluded from conversation had with the witness that morning that his testimony would not be in all respects as originally anticipated. Whereupon, the Court, over the objection of the defendant, stated that he would permit the District Attorney to cross-examine him as a hostile witness.

After the witness was sworn, the Court recalled counsel to the bench and stated that although cross-examination of the witness would be permitted, the Court felt that the witness should not be asked questions tending to affect his credibility, such as asking him if he had been convicted of a crime. With this view the District Attorney agreed, except that he stated that some of the evidence to be brought out on the main issues of the case during the examination would tend necessarily to affect the witness' credibility. It was at this point that the District Attorney revealed the alleged purpose in swearing the witness— to prove "motive."

The Court accepted this theory and made all subsequent rulings on objections on that basis. However, the real purpose in swearing Brunner was to prejudice the defendant by showing that he was associated with a man having a criminal record. This conclusion is supported by the fact that the District Attorney's reasoning on the theory of "motive" was completely fallacious because the defendant himself had testified before the Slaughter Committee. In addition, none of the three instruments, the non-production of which was relied upon by the Government as the basis of its case, in any manner related to the witness Brunner.

After asking the witness his name and address and one or two questions preliminary in nature, the following examination took place:

"Q. When did you first go to work for Mr. Fields or any of his organization, Mr. Brunner?

"A. On the 6th of November, 1945.

"Q. At that time were you on parole from a Federal institution?

"Mr. Mahoney: That is objected to, Your Honor.
"The Court: Objection overruled.
"Mr. Mahoney: And the grounds, Your Honor, have already been assigned to the Court at the bench.

"By Mr. Hitz:

"Q. Please answer, Mr. Brunner.
"A. Yes.
"Q. When were you released on parole?
"A. November 6th.
"Q. Of 1945"
"A. That is right.
"Q. You are no longer on parole now, are you?
"A. No, sir.
"Q. You have been finally discharged?
"A. That is right.
"Q. On what charge were you convicted, Mr. Brunner?

"Mr. Mahoney: That is objected to, Your Honor.
"The Court: I don't think that is necessary."

Clearly, the real object of these questions was not on the theory stated to the Court, but merely for the purpose of impeaching the witness' character and credibility and thus prejudicing the rights of the defendant.

This questioning was followed by several other queries relating to such immaterial matters as the sale of turkeys and salted peanuts, and then, without difficulty and with the full cooperation of the witness, the District Attorney brought out in detail the exact nature and extent of Brunner's activities on the so-called bronze wire deal.

Having fully accomplished his stated purpose in swearing the witness—that of showing Brunner's activities in enterprises somewhat speculative in nature, in contravention to the parole board's direction—the District Attorney then

embarked upon a strenuous cross-examination of the witness, attempting on several occasions to show previous contradictory statements before the Committee, and in other ways attacking the credibility of the witness.

The following excerpt from the District Attorney's summation, together with the manner in which the witness Brunner was examined, strongly indicates the real motive in calling him to the stand.

> "Mr. Dies, being the type of person you saw here, a person with engineering experience as well as sales experience—and perhaps I am conjecturing, and I think it is a fair assumption, and we can make fair assumptions here—probably did not care too much for the deal that he was getting out of the Fields outfit. He was sharing equally with Mr. Brunner, who, although he did not say he was engaged in surplus, I think was engaged in it very much, perhaps more than Mr. Fields would like to have told the Committee, and perhaps in other ways, and I am sure more than we have learned here at this trial.
>
> "At any event, Mr. Dies was dissatisfied with, perhaps, his participation evenly with Brunner, or perhaps for some other reason, and decided that he would sever his connections with the Field organization, and he did so on June 29."

It requires no stretch of the imagination to see that the District Attorney was suggesting to the jury that Dies had withdrawn from the defendant's corporation because a man of his character did not wish to be associated with Brunner who had a criminal record and whose activities were such that the defendant did not wish them to be known.

The rule that a party calling a witness may, if surprised by the answers given, cross-examine the witness in the discretion of the Court in order to refresh the recollection of

the witness or to annul the damage caused by the unexpected answer, is too well settled to be denied.

DiCarlo v. *United States,* 2 Cir., 6 F. (2d) 364;
Curtis v. *United States,* 10 Cir., 67 F. (2d) 943;
United States v. *Graham,* 2 Cir., 102 F. (2d) 436;
Walker v. *United States,* 4 Cir., 104 F. (2d) 465;
United States v. *Maggio,* 3 Cir., 126 F. (2d) 155.

However, even this privilege can be stretched to a point where it will constitute reversible error.

United States v. *Block,* 2 Cir., 88 F. (2d) 618.

But it is one thing to swear a witness and then be taken by surprise, and another to have knowledge of the witness' hostility before placing him on the stand. In the latter case, it is error to permit the party calling the witness to treat him as adverse,

Young v. *United States,* 5 Cir. 97 F. (2d) 200;
United States v. *Biener,* 52 Fed. Supp. 54,

and reversible error to permit the party swearing the witness thereafter to ask questions solely for the purpose of impeaching his credibility.

People v. *Minsky,* 227 N. Y. 94, 124 N. E. 126.

In *Young* v. *United States, supra,* the Court, in an opinion which contained a very comprehensive consideration of the rule relating to impeachment of one's own witness, said at page 205 of 97 F. (2d):

> "It is, in our opinion, never admissible under any sound interpretation of the rule, certainly not in Texas, nor in the Fifth Circuit, to offer a witness whose testimony the offerer knows in advance will be adverse, in order to get before the jury, in the form of impeachment, contradictory statements of his which are useful to the prosecutor" (Citing cases).

and further, at page 206, after citing several cases:

> "All of these cases make it clear that to admit such contradictions, there must be not only surprise, but damage, and the damage claimed must not have been self inflicted by continuing to put in damaging testimony after the witness's hostility or change of front has been discovered in order to open the gate to let his favorable ex parte statements in. Royal Ins. Co. *v.* Eastham, supra."

In *United States* v. *Biener, supra,* the District Attorney had knowledge of the witness' hostility before she was sworn. The Court said at page 56 of 52 Fed. Supp.:

> "One who calls a witness and anticipates adverse testimony cannot plead surprise and treat him as adverse. * * *"

In the case of *People* v. *Minsky, supra,* one of the People's necessary and material witnesses proved adverse although, as it appeared, not unexpectedly so, and the Court allowed the District Attorney to cross-examine her. But in addition thereto, the Court permitted the District Attorney to ask questions, the only object of which were to discredit the witness.

In reversing the judgment of conviction, and after acknowledging the fact that parties to an action are not necessarily limited to witnesses of good character, the Court of Appeals, in an opinion written by Judge Pound, said at page 98 of 227 N. Y.:

> "But when a disreputable witness is called and frankly presented to the jury as such, the party calling him represents him for the occasion and the purposes of the trial as worthy of belief. In the search for truth he may have to press the witness severely. Even the best of men may be an unwilling witness. But he must not thereafter attack the credibility of the witness by general character evidence tending solely to show him to be untruthful and unworthy of belief. Where the

> only effect of an affirmative answer to a question asked by a party to his own witness for such purpose will be to discredit the witness, the question is objectionable. Bullard *v.* Pearsall, 53 N. Y. 230; Pollock *v.* Pollock, 71 N. Y. 137, 152."

In view of the above, it is clear that the Trial Court committed reversible error in permitting the District Attorney to swear the witness Brunner and then, under the pretense that Brunner was a necessary and material witness to prove "motive" on the part of the defendant, to permit the District Attorney to impeach the witness by showing that he was associated with their defendant while on parole from a Federal institution for the commission of a crime, and by attempting to show that the witness had made false statements before the Slaughter Committee in order to cover up his activities with the defendant. It cannot be denied that the incident accomplished its desired purpose—that of prejudicing the defendant in the eyes of the jury. Thus depriving petitioner of a fair and impartial trial.

In the case of *Miller* v. *U. S.*, C. C. A. Kansas, 120 F. (2d) 968, the Court stated:

> "The Bars which guard the right to a 'fair trial' such as is guaranteed by the Constitution, include court procedure, Rules of Evidence, and proper instructions to the Jury, and these bars must not be lowered."

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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